

The Indian Child Welfare Act (ICWA)

Purpose

The purpose of the Indian Child Welfare Act, enacted by Congress in 1978, is to help promote the stability and security of American Indian tribes and families (25 U.S.C. ' 1902). It also provides the requirement that tribes are provided timely notification their children have been taken into state custody.

Congress recognized that a large number of American Indian families had been torn apart by the often unwarranted removal of the children by nontribal public and private agencies. (25 U.S.C. ' 1901(4)). These children were placed in foster or adoptive homes that were non-Indian, affecting the children's cultural upbringing (25 U.S.C. ' 1901(4)). The Indian Child Welfare Act establishes minimum federal standards for the removal of American Indian children and the placement of these children in foster or adoptive homes. It also provides funds to tribes for the operation of child and family services programs (25 U.S.C. ' 1902).

Jurisdiction

- (1) Unless jurisdiction is otherwise vested in a state by federal law, the act gives the tribe exclusive jurisdiction over any American Indian child who resides or is domiciled within the reservation (25 U.S.C. ' 1911(a)).
- (2) If the child is a ward of the tribal court, that court has exclusive jurisdiction over the child regardless of the residence or domicile (25 U.S.C. ' 1911(a)).
- (3) In the absence of good cause to the contrary or the objection of either parent, a state court must transfer any foster care or termination of parental rights proceeding concerning an Indian child not domiciled or residing within the reservation of the Indian child's tribe to the jurisdiction of the tribe (25 U.S.C. ' 1911(b)).
- (4) The child's tribe and custodian may intervene at any point in a state court proceeding when that proceeding addresses either foster care placement or termination of parental rights (25 U.S.C. ' 1911(c)).
- (5) All judicial proceedings, public acts and records of an American Indian tribe which are applicable to American Indian child custody proceedings must be given full faith and credit (25 U.S.C. ' 1911(d)).

Definitions

Indian - Any person who is a member of an Indian tribe, or who is an Alaska native and a member of a regional corporation as defined in 1606 of title 43 (25 U.S.C. ' 1903(3)).

Indian Child - Any unmarried person who is under age 18 and is either: (a) a member of an Indian tribe or (b) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe (25 U.S.C. ' 1903(4)).

Custody Proceedings Covered by the Act

The act applies to:

- (1) **Involuntary foster care placement** (voluntary placement is covered separately). In order to remove an American Indian child from the home, there needs to be clear and convincing evidence that the continued custody of the child by the parents or Indian custodian is likely to result in serious emotional or physical damage to the child (25 U.S.C. ' 1912(e)). The act applies not only to the initial foster care placement, but also to all subsequent placements unless the child is being returned either to the parents or the Indian custodian from which the child originally was taken (28 U.S.C. ' 1961(b)).
- (2) **Termination of parental rights.** In order to terminate parental rights there must be a showing that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. This finding must be supported by evidence beyond a reasonable doubt (25 U.S.C. ' 1912(f)).
- (3) **Pre-adoptive and adoptive placements.** Pre-adoptive placement is the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement (25 U.S.C. ' 1903(iii)). The purpose of a pre-adoption proceeding is to insure that all placements are subject to the protections afforded by the act, and that the act's adoptive placement preferences cannot be avoided by labeling an Indian child as not-adoptable (Bureau of Indian Affairs Report 1984 (67)). Adoptive placement is the permanent placement of an American Indian child which includes any action resulting in a final decree of adoption (25 U.S.C. ' 1903(iv)).

Criteria for Placements

The Indian Child Welfare Act describes the criteria that must be met when placing a child in foster care or pre-adoptive care initially and when reviewing the child's placement. The child must be placed in a setting that will meet any special needs that child may have and

will also be the least restrictive setting which most approximates a family. The foster or pre-adoptive home must be within a reasonable proximity to the child's natural home.

A preference shall be given, in the absence of good cause to the contrary, to a placement with (i) a member of the Indian child's extended family, (ii) a foster home licensed, approved, or specified by the Indian child's tribe, (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs (25 U.S.C. ' 1915(b)).

When placing an American Indian child in an adoptive placement, A preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family, (2) other members of the Indian child's tribe or (3) other Indian families (25 U.S.C. ' 1915(a)).